

No. 88-274

Supreme Court, U.S.

FILED

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JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

DAVID O. WILSON, Petitioner,

v.

ANNA M. HARELSON, et al., Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

PETITIONER'S SUPPLEMENTAL BRIEF

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September 1, 1988

LIST OF PARTIES AND RULE 28.1 STATEMENT

The parties to the proceedings below were the petitioner David O. Wilson and the respondents Anna M. Harelson, Anna M. Harelson, Ph.D., Inc., Defined Benefit Plan, Louis Rigali and Julianne Rigali.

The respondents before this Court are Anna M. Harelson, Anna M. Harelson, Ph.D., Inc., Defined Benefit Plan, Louis Rigali and Julianne Rigali.

Petitioner David O. Wilson has no parent companies, subsidiaries, or affiliates to list pursuant to Supreme Court Rule 28.1.

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SUPPLEMENTAL BRIEF IN SUPPORT OF
PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT



In compliance with Supreme Court Rule 22.6 petitioner David O. Wilson ("petitioner") hereby submits this supplemental brief in support of the petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit, No. 88-274 on file at present with the Court.

The purpose of this supplemental brief is to advise the Court of the recent action taken by the Ninth Circuit to issue an Order and Amended Opinion, sua sponte, in this case. A copy of the Ninth Circuit's Order and Amended Opinion ("Amended Opinion") issued on August 22, 1988, is attached hereto as Appendix IV.

REASONS FOR GRANTING THE WRIT

- I. The Legal Conclusion Reflected In The Ninth Circuit's Amended Opinion Is Not Supported By The Factual Findings Of The District Court.

The August 22, 1988 amended opinion of the Ninth Circuit modified the May 9, 1988 original opinion in only one respect: the Ninth Circuit merely substituted one legal conclusion for another. The three judge panel deleted the sentence and citation, "His acts were 'a substantial factor' in the transactions. SEC v. Murphy, 626 F.2d 633, 650-652 (9th Cir. 1980)," and in its place, inserted the following: "He solicited the sale. He was a seller. Pinter v. Dahl, _____ U.S. _____, No. 86-805, June 15, 1988." In all other respects the Ninth Circuit's original opinion remains unchanged.



The facts are as the District Court found them.¹ The District Court found that respondents sought out petitioner and requested a meeting to discuss the investment.² Further, the District Court expressly found that petitioner "never recommended that any investments be undertaken" and that "no evidence was adduced indicating that [petitioner] made a recommendation."³

No one challenged the factual findings of the District Court on appeal; nor does the Circuit Court purport to modify those findings. Although the three judge panel

¹ The District Court's factual findings are entitled to great deference by the Ninth Circuit, even if it is convinced that it would have decided the case differently. Federal Rule of Civil Procedure 52(a); Anderson v. City of Bessemer City, North Carolina, 470 U.S. 564 (1985).

² Appendix III at A-37.

³ Appendix III at A-47 and A-48.



cites Pinter v. Dahl, _____ U.S. _____,
[Current] Fed. Sec. L. Rep. (CCH) ¶ 93,790,
88 Daily Journal D.A.R. 7654 (June 15,
1988) as the predicate for its legal
conclusion that petitioner "solicited the
sale," the panel does not reconcile the
legal standard articulated in Pinter with
the express findings of the District Court.

Petitioner submits that under the
facts found by the District Court his
limited activities do not give rise to a
legal finding of "solicitation" and do not
support a finding of "seller" liability
under section 12(1) of the Securities Act
of 1933, 15 U.S.C. 771(1), under the Pinter
standard.

Accordingly, petitioner respectfully
submits that the Ninth Circuit's amended
opinion should be reversed and the matter



remanded to the District Court for appropriate disposition. ⁴

CONCLUSION

For the foregoing reasons, this petition for certiorari should be granted. If the petitioner is correct in urging that the legal finding of "solicitation" in the Ninth Circuit's Amended Opinion is not

⁴ Although petitioner does not believe the District Court's findings can be construed to support a finding of "solicitation," if the Court believes additional factual findings are required in light of Pinter, petitioner submits that the matter should be remanded to the District Court for that limited purpose.

supported by the factual findings of the District Court, the matter should be reversed and remanded to the Northern District for appropriate disposition.

DATED: September 1, 1988

Respectfully submitted,

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APPENDIX IV

MODIFICATION

Cite as 88 Daily Journal D.A.R. 10841

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ANNA M. HARELSON; ANNA M.)
HARELSON, PHD., INC.; DEFINED)
BENEFIT PLAN; LOUIS A. RIGALI;)
JULIANNE RIGALI,)
Plaintiffs-Appellees/)
Cross-Appellants,)
)
v.)
)
MILLER FINANCIAL CORPORATION, a)
California corporation;)
Defendant,)
)
and)
)
DAVID O. WILSON,)
Defendants-Appellants/)
Cross-Appellees.)
_____)

Nos. 87-1584; 87-1653

D.C. No. CV-84-4269-EFL

ORDER AND AMENDED OPINION

Appeals from the United States
District Court
for the Northern District of California
Eugene F. Lynch, District Judge, Presiding



Argued and Submitted
December 17, 1987-San Francisco, California

Filed May 9, 1988

Amended August 22, 1988

Before: Betty B. Fletcher, Charles Wiggins
and John T. Noonan, Jr., Circuit Judges.

Opinion by Judge Noonan;
Concurrence by Judge Fletcher

COUNSEL

Robert A. Huddleston, Tonsing, Heimann &
Huddleston, Danville, California, for the
plaintiffs-appellees-cross-appellants.

Deborah A. Klar and Michael F. Perlis,
Pettit & Martin, San Francisco,
California, for the
defendants-appellants/cross-appellees.

ORDER

The opinion is amended as follows:



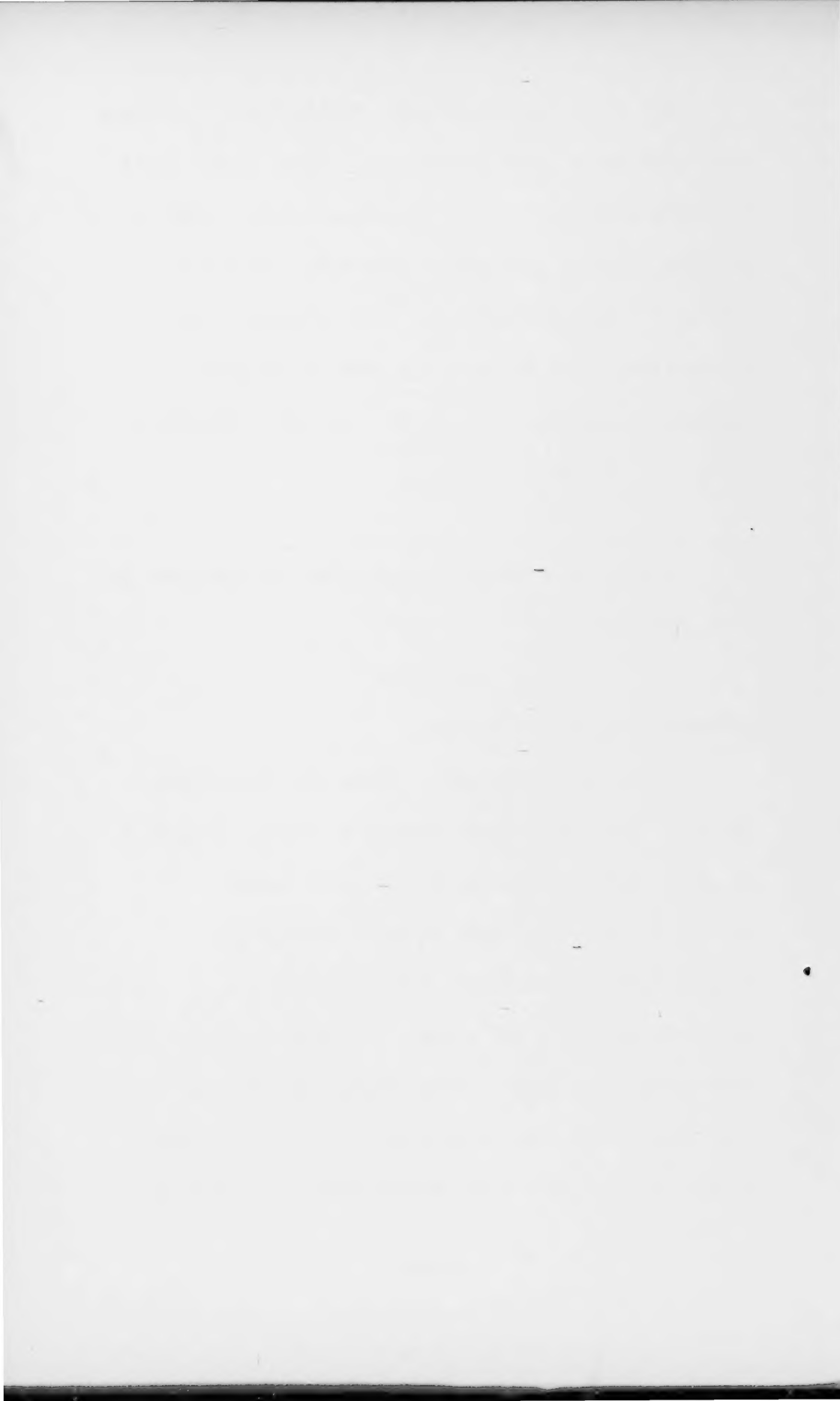
At slip opinion pp. 5250-5251, strike the sentence and citation, "His acts were "a substantial . . . transaction. SEC v. Murphy, 626 F.2d 633, 650-652 (9th Cir. 1980)." Substitute in its place, "He solicited the sale. He was a seller. Pinter v. Dahl, ____ U.S. ___, No. 86-805, June 15, 1988."

Judge Fletcher continues to concur in the result.

OPINION

NOONAN, Circuit Judge:

Anna M. Harelson, Anna M. Harelson, Ph.D., Inc. Defined Benefit Plan, Louis A. Rigali and Julianne J. Rigali sued David O. Wilson and others alleging violation of Section 12(1) of the Securities Act of 1933, 15 U.S.C. § 771(1) and other wrongs. The case was tried in the district court without a jury. The court found for the defendant on several



counts but gave judgment for the plaintiffs on their Section 12(1) claims, limiting recovery by application of the statute of limitations. Wilson appeals the judgment that he was a seller of the securities; the Rigalis appeal the application of the statute of limitations. We affirm the district court's judgment of liability and hold that the statute of limitations is not a barrier to the Rigali claims. We remand for entry of judgment on these claims.

FACTS

In 1983 Wilson became an agent with Miller Financial Corporation, which was an agent for the Carter Company, a corporation engaged in the business of factoring the claims of doctors. Wilson was paid a commission on promissory notes of the Carter Company which he sold. Louis Rigali heard about the Carter Company from Wilson's brother and made an

appointment for himself and his wife to see Wilson, who met with them on June 22, 1983. Wilson met with Harelson on July 1, 1983 after arranging an appointment in response to her telephone call.

At each of the meetings Wilson used a brochure produced by the Carter Company to explain its program of factoring doctors' claims. He stated that an investor would receive a return of 7 percent over 90 days on the amount invested but that the rate or return could vary from 20 percent annually to 30 to 33 percent ~~annually~~ depending on the company's success. He stated that in the seven-year history of the company it had never failed to pay an investor. He said that he himself had invested in the company. He said that Mr. Carter was a man of substantial means. At the conclusion of each meeting he helped the plaintiffs complete forms by

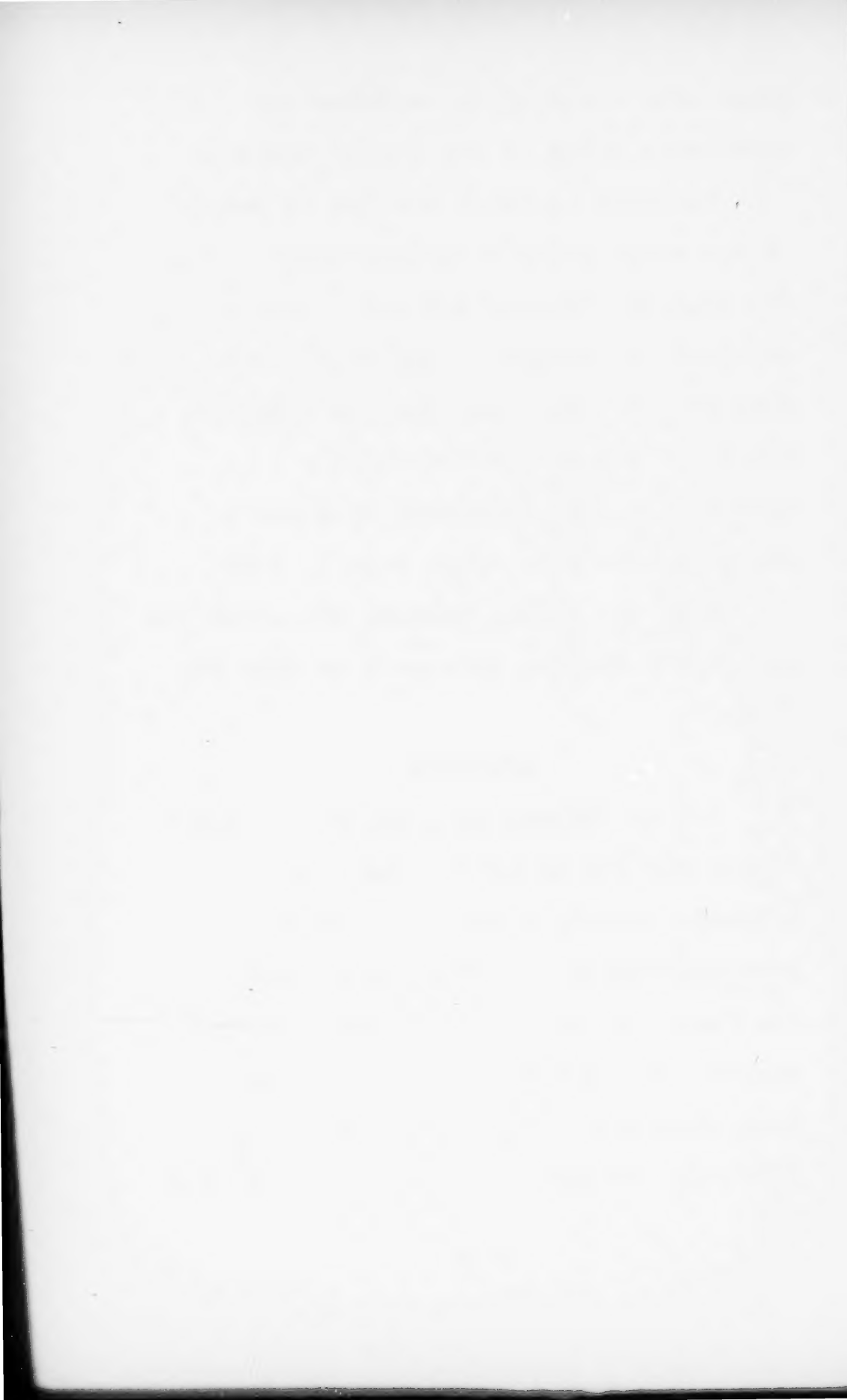
which they invested in exchange for promissory notes of the Carter Company.

Harelson invested \$34,500 on behalf of her corporation's Defined Benefit Plan; the Rigalis invested \$13,000. Wilson accepted the checks of the plaintiffs. On June 27, 1983 he forwarded the Rigalis' checks to the Miller Financial Corporation. He forwarded Harelson's check on some date after July 1, 1983.

When the Carter Company defaulted the plaintiffs brought this suit on June 25, 1984.

ANALYSIS

[1] 1. Wilson as a Seller. David O. Wilson and the archetypal American salesman, Willie Loman, are scarcely distinguishable. On the facts found by the district court, Wilson was a seller within the meaning of § 12(1) of the Securities Act of 1933, 15 U.S.C. § 771(1). Wilson did not personally seek



out the customers, but, like a car salesman, waited for them to come to his place of business. He presented the basic facts necessary to effectuate a sale. His use of a company brochure was typical of any salesman offering a product. He was compensated for the work he did in bringing the sales about.

[2] SEC v. Rogers, 790 F.2d 1450 (9th Cir. 1986), relied on by Wilson in this court, is irrelevant: in that case the district court had found as a fact that the defendant had not been a "salesman." To the contrary, in this case the district court, on the basis of ample evidence, found Wilson was a salesman. He was the "but for cause" of the sale. His participation was far more than de minimis. "He solicited the sale. He was a seller. Pinter v Dahl, __ U.S. __, No. 86-805, June 15, 1988."



2. Statute of Limitations. The statute of limitations began to run when Wilson ceased to participate in the sale. That participation as to the Rigalis did not cease until he delivered their check to Miller Financial Corporation on June 27, 1983. Accordingly, he is liable for the sale to the Rigalis.

AFFIRMED IN PART, REVERSED IN PART
AND REMANDED TO ENTER JUDGMENT FOR THE
RIGALIS. Costs are to be borne by Wilson.

FLETCHER, Circuit Judge:

I concur in the result.